IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3588 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GREEN ROADWAYS

Versus

J M PANDYA

Appearance:

1. Special Civil Application No. 3588 of 1988

MR PM THAKKAR for Petitioner No. 1

MR PM RAVAL for Petitioner No. 1

MR JD AJMERA for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 28/06/2002

ORAL JUDGEMENT

What is challenged in this petition, which is instituted under Articles 226 & 227 of the Constitution, is the order dated February 25, 1988 passed by the

Regional Provident Fund Commissioner, Gujarat State, by which the petitioner has been called upon to pay damages of Rs.59,369.90 ps., under the provisions of Section 14-B of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("the Act" for short).

2. The petitioner is an establishment to which the provisions of the Act are applicable. It was required to pay the amount of provident fund/ family pension fund/ deposit linked insurance fund and administrative charges on both, in accordance with Section 6 of the Act, Paragraph 38 of the Employees' Provident Funds Scheme, 1952 as well as Paragraph-10 of the Employees' Family Pension Funds Scheme, 1971 and Paragraph-8 of the Employees' Deposit Linked Insurance Scheme, 1976. The petitioner failed to pay the provident fund/ family pension fund/ deposit linked insurance fund and administrative charges, on both, as required by law for the period from May, 1973 to July,1986. Therefore, the Regional Provident Fund Commissioner, Gujarat State, had issued notice dated September 7, 1987 calling upon the petitioner to show cause as to why damages as envisaged under section 14-B of the Act should not be levied and recovered. The petitioner had filed reply to the notice by letter dated September 25, 1987 and had also made representation through its authorised officer before the Regional Provident Fund Commissioner. The Regional Provident Fund Commissioner took into consideration the contentions raised by the petitioner and after taking into consideration the documents on record, concluded that without sufficient cause, the petitioner had failed to pay the provident fund/ family pension fund/ deposit linked insurance fund as well as administrative charges and that this was a fit case for levying the damages as contemplated by Section 14-B of the Act. In view of the said conclusion, the competent authority by order dated February 25, 1988 has called upon the petitioner to pay the damages of Rs. 59,369.90 ps., giving rise to the present petition.

3. On service of notice, an affidavit-in-reply has been filed on behalf of the respondent controverting the averments made in the petition. However, having regard to the facts of the case, I am of the opinion that it is not necessary to refer to the same in detail.

4. Ms. Sangita Pahwa, learned counsel for the petitioner submitted that without giving due consideration to the financial difficulties faced by the petitioner, the competent authority has determined and levied the damages and as the impugned order suffers from

the vice of non-application of mind, the same should be set aside. It was argued that for the default, which was made during the period from 1973 to 1980, the proceedings under section 14-B of the Act were initiated as late as in the year 1987 and, therefore, the petition should be allowed. What was claimed was that the record does not show that the petitioner had persistently delayed the remittance of provident fund/ family pension fund/ deposit linked insurance fund etc., and, therefore, the finding recorded by the competent authority that there was persistent default on the part of the petitioner in remitting the amount due on due dates, being erroneous, the relief claimed in the petition should be granted. According to the learned counsel for the petitioner, the competent authority has not only ignored the guidelines formulated by the Central Board of Trustees, which is the highest authority under the Act regarding determination of the damages under section 14-B of the Act, but has also ignored the standard table for levy of damages formulated by the Central Provident Fund Commissioner before determining the damages in the instant case and, therefore, the order impugned in the petition should be quashed. The learned counsel submitted that the order passed by the competent authority exhibits complete non-application of mind and, therefore, the petition should be accepted.

5. Mr. B.T.Rao, learned Additional Standing Counsel for the Central Government, has supported the order passed by the competent authority, and prayed the Court to dismiss the petition in view of the binding Division Bench judgment of this Court rendered in Arvind Mills Ltd. v. R.M.Gandhi & Ors., 22 G.L.R. 994.

6. At the outset, it may be stated that what is challenged in the petition is order passed by the competent authority under the provisions of Section 14-B of the Act. It is relevant to notice that under the provisions of Section 7-D of the Act, Employees' Provident Funds Appellate Tribunal is constituted, and an appeal is maintainable before the said Tribunal against the order passed by the competent authority under section 14-B of the Act in view of the provisions of Section 7-I of the Act. However, the appellant has chosen not to prefer an appeal before the Appellate Authority and approached this Court under Articles 226 & 227 of the Constitution.

7. Before I deal with the submissions urged on behalf of the petitioner, it would be advantageous to instruct this Court about the well-defined scope of a

petition of the present nature. In Arvind Mills Ltd. (supra), the Division Bench of this Court, while hearing a petition under Articles 226 & 227 of the Constitution against an order passed by the competent authority under Section 14-B of the Act, has made following pertinent observations :-

> "This Court in exercising powers under Article 227 will not convert the proceeding virtually into an appeal against the impugned order. This Court will not substitute its determination in place of the determination made by the competent authority. It is not for this Court to consider to what extent damages would have been levied by this Court if it was exercising the powers which have been exercised by the competent authority in passing the impugned order. In other words, this petition cannot be treated as virtually an appeal on merits against the impugned order. So also it is not necessary in order to uphold the order passed by the competent authority that we must agree with each and every of the reasons which weighed with him or agree with every word said by him in his impugned order. It must also be realised that having regard to the law laid down in Organo Chemical Industries v. Union of India, (1979) II Labour Law Journal, 416, it is open to the competent authority to levy damages to the extent of 100% and that the order determining damages will not become vulnerable merely on the ground that in respect of certain items 100% damages have been imposed."

From the principles of law laid down by the Division Bench of this Court it is manifest that the present proceeding cannot be treated as an appeal against the impugned order, nor the Court can substitute its determination in place of determination made by the competent authority, nor the Court can consider to what extent damages would have been levied by this Court if it exercises the powers which have been exercised by the competent authority in passing the impugned order. Having noticed the parameters of powers under Articles 226 & 227 of the Constitution, I now proceed to consider the submissions advanced at the Bar.

8. The contention that the proceedings have been initiated late and, therefore, the impugned order should be set aside, cannot be accepted. It is pertinent to note that this plea was never raised before the competent authority and is sought to be raised for the first time

in the petition. In Gandhidham Spinning and Manufacturing Co.Ltd. v. The Regional Provident Fund Commissioner & Anr., 1987 Lab IC 659, the Division Bench of this Court has held that Section 14-B does not prescribe any period of limitation to initiate proceedings for levy of damages and the question whether there is any unreasonable delay in initiating the proceeding or not, will have to be decided in the light of facts and circumstances obtaining in a case. As noted earlier, this plea was never raised by the petitioner before the competent authority. Had it been raised, the same would have been considered and answered by the competent authority. The statement, which was attached to the show-cause notice, makes it evident that the petitioner establishment had persistently delayed remittance of the provident fund due. Further, the last default made by the petitioner relates to the month of July, 1986. Under the circumstances, it is difficult to uphold the contention of the petitioner that there was unreasonable delay on the part of the competent authority in initiating the proceeding under section 14-B of the Act and, therefore, the order is liable to be set aside. The record does not show as to when the default on the part of the petitioner was detected by the competent authority and if the plea had been raised at the appropriate time before the Authority, the same could have been considered by the Authority. The delay in issuing the show-cause notice cannot by itself vitiate the proceeding for levying damages, but it may in certain cases give room for considering the levy of damages at less rates. Under the circumstances, the plea that there is unreasonable delay on the part of the Authority in issuing notice under section 14-B of the Act and, therefore, the impugned order should be set aside, cannot be accepted and is rejected hereby.

9. The plea that there were financial difficulties, due to which there was delay on the part of the petitioner in remitting the amount due to the Authority and, therefore, damages should not have been levied, is devoid of merits. This plea has been considered, in detail, by the Authority and negatived by cogent reasons, which is evident from the impugned order. It is relevant to notice that the petitioner had failed to pay, in time, even the employees' share of contributions, which it had deducted and recovered from their wages. As provided under Paragraph-32 of the Employees' Provident Funds Scheme, 1952, any sum deducted and recovered by an employer from the wages of an employee under the Scheme, shall be deemed to have been entrusted to him for the purpose of paying the contribution in respect of which it

was deducted. The employee's share being the trust money, failure of the employer to deposit the same would tantamount to criminal breach of trust, and the employer like the petitioner cannot be given any relief on the ground that it was facing financial difficulties and, therefore, could not remit the amount due in time. Moreover, except making a bald statement that the petitioner was facing financial difficulties, no documentary evidence was produced by the petitioner before the competent authority and it is so recorded by the competent authority in the impugned order. This statement recorded by the competent authority in the impugned order is not disputed by the petitioner in the present petition. Further, section 14-B of the Act creates an absolute liability and no relief can be given to the petitioner on the ground that lenient view of the matter ought to have been taken because it was facing financial difficulties at the relevant time.

10. The plea that the guidelines issued by the Central Board of Trustees for determining the damages under section 14-B of the Act as well as Standard Table for levy of damages issued by the Central Provident Fund Commissioner have been ignored and, therefore, the petition should be allowed, has no merits. It is relevant to notice that the Standard Table for levy of damages formulated by the Central Provident Fund Commissioner was not brought to the notice of the competent authority. Further, statutory discretion of the competent authority acting under the provisions of Section 14-B of the Act can be fettered or taken away either by the guidelines or by the Standard Table for levy of damages. Therefore, their non-consideration cannot be considered as having vitiating effect on the discretion exercised by the competent authority.

11. The plea that 100% damages should not have been levied and, therefore, the impugned order should be set aside, is merely stated to be rejected. Looking to the merits and circumstances of the case, and after applying mind to all the contentions and submissions advanced on behalf of the petitioner, the Regional Provident Fund Commissioner, Gujarat State, has determined the damages as under :-

"(1) Default for the month of 5/73, damages be levied at 10% p.a. upto 15.6.1973 and 5% for continuous defaults and for the month of 6/73 damages be levied at 25% of the amount.

(2) Default for the period from 7/73 to 8/75, 4/76, 11/76 and 2/80 damages be levied at the ranging rates from 2% to 50% of the amount and for the period from 9/75 to 2/76, 5/76 to 10/76, damages be levied at 100% of the amount, i.e. equivalent to the amount.

(3) Default for the month of 7/86, damages be levied at 25% p.a."

Having regard to the facts of the case, determination of damages cannot be said to be arbitrary or unreasonable by any standard. Moreover, as held by the Division Bench of this Court, the High Court, while exercising powers under Articles 226 & 227, cannot substitute the determination of damages made by the competent authority under section 14-B of the Act. Therefore, the impugned order is not liable to be set aside on the ground that damages assessed are excessive. On perusal of the impugned order it is evident that the competent authority has taken into consideration not only the contentions raised by the petitioner, but has also taken into consideration other relevant factors as well as law on the point, and after applying mind, has rendered the order. Under the circumstances, I am of the firm opinion that no ground is made out by the petitioner to interfere with the said order in the present petition and the petition is liable to be dismissed.

For the foregoing reasons, the petition fails and is dismissed. Rule is discharged,with no order as to costs. Interim relief granted earlier is hereby vacated.

(J.M.Panchal,J.)

(patel)